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STATE OF WISCONSIN
IN SUPREME COURT
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OF WISCONSIN

No. 2012AP55

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDRES ROMERO-GEORGANA,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE
WISCONSIN COURT OF APPEALS
AFFIRMING AN ORDER OF THE
BROWN COUNTY CIRCUIT COURT,
THE HON. KENDALL M. KELLEY, PRESIDING,
DENYING A WIS. STAT. § 974.06 MOTION FOR
COLLATERAL POSTCONVICTION RELIEF

**BRIEF OF PLAINTIFF-RESPONDENT
STATE OF WISCONSIN**

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**STATEMENT ON ORAL ARGUMENT
AND PUBLICATION**

By granting review in this case, this court has determined that the case is sufficiently important to merit both oral argument and publication.

STATEMENT ON ISSUE PRESENTED

The issue presented in Romero-Georgana's brief, at 1, reads:

Is Romero-Georgana entitled to an evidentiary hearing based on his Wis. Stat. § 974.06 motion alleging ineffective assistance of postconviction counsel for failing to raise a strong argument for plea withdrawal?

Romero-Georgana's brief candidly acknowledges that the assertion of this single issue represents a change from the issues he argued in the court of appeals and then raised in his petition for review. The State adds this statement to its brief simply to highlight and clarify the issue change.

Romero-Georgana asserted in his *pro se* Wis. Stat. § 974.06 motion (92:7-8; Pet-Ap. E-7-E-8) and argued in his *pro se* brief in the court of appeals (Romero-Georgana's Ct. App. Brief, at 2), that there were *two* claims for withdrawal of his no-contest plea that his postconviction counsel should have raised and was ineffective in having failed to pursue these claims: (1) that his trial counsel was ineffective for failing to fully explain the deportation consequences of his no-contest plea; and (2) that the circuit court failed to give the statutorily-required warnings on the immigration consequences of a plea. After the court of appeals affirmed the denial of Romero-Georgana's § 974.06 motion (94; Pet-Ap. C-1), he reasserted these claims in his *pro se* petition for review (Romero-Georgana's petition, at 1). This court subsequently granted the petition for review and ordered *pro bono* counsel for Romero-Georgana. The order granting review contained

the customary provision limiting argument to the issues raised in the petition for review, unless otherwise ordered by the court.

In his brief in this court, Romero-Georgana has narrowed this case to the single issue quoted above. As explained in his brief (Romero-Georgana's Brief, at 2 n.1), he is no longer arguing the first ineffectiveness claim of his § 974.06 motion: that his postconviction counsel was ineffective for failing to raise the claim that his trial counsel was ineffective for failing to explain to him the deportation consequences of his no-contest plea. He has determined that this is not a claim on which he can legally prevail. *Id.* Thus, the sole ineffectiveness claim he pursues is the second claim of his § 974.06 motion: "that postconviction counsel failed to advise Romero-Georgana about the possibility of plea withdrawal on the basis of the circuit court's failure to give the required immigration warnings at the plea hearing" (Romero-Georgana's Brief, at 2). As referenced in his statement of the issue presented, (Romero-Georgana's Brief, at 1), this is the "strong argument" he contends his postconviction counsel was ineffective in failing to pursue on his behalf when counsel elected to pursue an ultimately successful claim for resentencing. And this is the claim of ineffectiveness of postconviction counsel on which he contends he should have been granted an evidentiary hearing.

ARGUMENT

ROMERO-GEORGANA'S § 974.06 MOTION DID NOT STATE SUFFICIENT GROUNDS FOR THE GRANTING OF RELIEF ON THE CLAIM THAT HIS POST- CONVICTION COUNSEL WAS INEFFECTIVE IN HER CHOICE OF THE GROUND AND REMEDY TO PURSUE BY ORIGINAL POST- CONVICTION MOTION.

A. Nature of the controversy before this court.

Romero-Georgana describes his § 974.06 motion – and this appeal – as resting upon “a relatively simple story” (Romero-Georgana’s Brief, at 3).

The State agrees. But the story has more components than the undisputed fact that Romero-Georgana pled no-contest in 2006 to a single count of first-degree sexual assault at a plea hearing at which the court did not warn him of the immigration consequences of his plea. The story of this case has several other important aspects:

- instead of seeking plea withdrawal for lack of the immigration warning, Romero-Georgana’s initial postconviction counsel, an experienced assistant state public defender, brought a postconviction motion in 2007 that challenged his sentence for the trial court’s failure to consider appropriate sentencing guidelines (31);

- the trial court denied the sentence challenge (35), but this court upheld it, summarily reversed the circuit court's order, and remanded the case for resentencing (44);
- the defense victory was short-lived, for a longer sentence was imposed by a different judge at Romero-Georgana's resentencing in 2008 (62);
- a challenge to the longer sentence was rejected in the circuit court (68; 75) and affirmed in 2010 on a no-merit appeal (87; Pet-Ap. B-1–B-4);
- then, in September of 2011, Romero-Georgana filed the *pro se* § 974.06 motion (92; Pet-Ap. E-1–E-11) that led to the present appeal. It was in this motion, filed almost five years after his plea and conviction and after two previous postconviction motions and appeals to this court, that Romero-Georgana first challenged his original postconviction counsel's effectiveness in challenging his sentence rather than seeking withdrawal of his no-contest plea (92:7-8; Pet-Ap. E-7–E-8).

His claim of ineffectiveness of postconviction counsel has a very specific, necessary, and determinative purpose. At this late date, in order to seek withdrawal of his no-contest plea on the ground that the circuit court did not personally advise him that his plea might result in his deportation, Romero-Georgana must overcome his

failure to do so earlier. He candidly acknowledges this:

[S]ince this § 974.06 motion came after two prior postconviction motions under Wis. Stat. §§ 809.30 and 974.02, Romero-Georgana must allege a “sufficient reason” why the claims were not raised in his previous motions. See **State v. Escalona-Naranjo**, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994); see also § 974.06(4). In some cases, ineffective assistance of postconviction counsel may constitute a “sufficient reason as to why an issue which could have been raised on direct appeal was not.” **State ex rel. Rothering v. McCaughtry**, 205 Wis. 2d 675, 682, 556 N.W.2d 905 (Ct. App. 1996).

Romero-Georgana’s Brief at 7.

Romero-Georgana’s § 974.06 motion asserted the ineffectiveness of his initial postconviction counsel as the “sufficient reason” for his failing to seek plea withdrawal under Wis. Stat. § 971.08(2) in his previous motions. But the circuit court ruled that his counsel ineffectiveness allegations were conclusory and legally insufficient (94; Pet-Ap. C-1–C-3). The court of appeals agreed (Pet-Ap. D-1–D-5). And because his motion allegations were not sufficient to state a valid claim of postconviction counsel’s ineffectiveness, the appellate court ruled that the motion failed to “establish sufficient reason for the court not to apply the procedural bar to successive postconviction motions set out in **State v. Escalona-Naranjo**” (Pet-Ap. D-4).

Thus, this case turns upon the answer to a relatively narrow question: whether Romero-

Georgana's § 974.06 motion alleged sufficient facts which, if proven at an evidentiary hearing, would establish the ineffectiveness of his initial postconviction counsel and thereby provide a "sufficient reason" to overcome the *Escalona-Naranjo*¹ bar to his § 974.06 motion and permit him to proceed with his belated claim that withdrawal of his plea should be granted because of the circuit court's failure to provide the deportation advisement required by Wis. Stat. § 971.08(1)(c). That is the dispositive issue in this case. It is the subject of Argument section II of Romero-Georgana's brief and it is the question to which the State devotes the remainder of its brief.² The circuit court properly denied Romero-Georgana's ineffective assistance of postconviction counsel claim without holding an evidentiary hearing.

¹ *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

² The question before this court is not whether the circuit court at Romero-Georgana's plea hearing failed to personally advise him of the possible deportation consequences of his plea, as required by Wis. Stat. § 971.08(1)(c). The circuit court did not give that advisement, as the State conceded in its brief before the court of appeals (State's Ct. App. Brief at 7). Nor, in the State's view, is it necessary to determine whether Romero-Georgana has adequately alleged that he is likely to be deported based on his plea and conviction. A Department of Homeland Security deportation order was issued in November of 2007 (Pet-Ap. F-1). Thus, a response by the State to – and this court's consideration of – Argument section I of Romero-Georgana's brief is unnecessary. Had Romero-Georgana pursued a Wis. Stat. § 971.08(2) claim in a timely manner, he might well have prevailed on it. The question in this case, however, is whether, having failed to pursue the claim in two previous postconviction motions and appeals, he is procedurally barred from doing so under *Escalona-Naranjo*'s bar on serial postconviction motions.

1. General legal principles on ineffective assistance of counsel.

To prove a claim of ineffective assistance of counsel the defendant must show both that his attorney's performance was deficient and that the defendant was prejudiced as a result. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Since the defendant must establish both deficient performance and prejudice to prevail on a claim, a court need not address both components if the defendant fails to establish either one. *Strickland*, 466 U.S. at 697.

With respect to the "performance" component, counsel is presumed to have acted properly, so the defendant must demonstrate that his attorney made serious mistakes which could not be justified in the exercise of objectively reasonable professional judgment, deferentially considering all the circumstances from counsel's contemporary perspective to eliminate the distortion of hindsight. *Strickland*, 466 U.S. at 689-91. The presumption that counsel is effective unless a challenging defendant shows otherwise applies to postconviction and appellate counsel as well as trial counsel. *State v. Balliette*, 2011 WI 79, ¶ 28, 336 Wis. 2d 358, 805 N.W.2d 334.

With regard to the "prejudice" component, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" means a "substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. ___, 131 S.Ct. 1388,

1403 (2011) (internal quotation marks omitted). *Accord State v. Starks*, 2013 WI 69, ¶ 55, 349 Wis. 2d 274, 833 N.W.2d 146.

To establish prejudice in the context of a case concluded by a guilty or no-contest plea, a defendant must prove that if defense counsel had not performed deficiently, “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). *Accord Missouri v. Frye*, 132 S.Ct. 1399, 1409 (2012).

And where a defendant alleges the ineffectiveness of postconviction counsel in connection with a first appeal as of right, a defendant does not have a constitutional right to have postconviction or appellate counsel raise every nonfrivolous issue the defendant requests. *Jones v. Barnes*, 463 U.S. 745, 754 (1983). Indeed, postconviction counsel should not raise every nonfrivolous claim; counsel is expected to exercise professional judgment in selecting from among the available issues in order to maximize the likelihood of success in postconviction review. *Smith v. Robbins*, 528 U.S. 259, 288 (2000).³

³ A defendant who alleges ineffective assistance of appellate counsel based on counsel’s decision to raise some issues and not others is required to show that the issues counsel chose not to raise are “clearly stronger” than those that were raised. *State v. Starks*, 2013 WI 69, ¶¶ 56-60, 349 Wis. 2d 274, 833 N.W.2d 146. The State agrees with Romero-Georgana’s view (Romero-Georgana’s Brief at 24-25 n.7) that the “clearly stronger” standard is applicable to the postconviction motion context as well as on appeal.

2. Pleading sufficiency and the granting of an evidentiary hearing on an ineffective assistance of counsel claim.

It is a long-established tenet of Wisconsin law that a properly pleaded claim of ineffective assistance of trial counsel triggers an evidentiary hearing at which counsel testifies regarding his challenged conduct. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979); *see also State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App.), *review dismissed*, 584 N.W.2d 125 (1998) (reaffirming *Machner* hearing as condition precedent for reviewing claim of ineffective assistance of trial counsel). But a defendant is not automatically entitled to an evidentiary hearing on a postconviction motion claim. A circuit court's decision to summarily deny a motion must be measured against the standard set in *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972), and reaffirmed in *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996).

A hearing is required only if the motion alleges facts which, if proved true, would entitle the defendant to relief. *See Bentley*, 201 Wis. 2d at 310; *Nelson*, 54 Wis. 2d at 497. If the defendant's motion on its face fails to allege sufficient facts to raise a question of fact, or if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the circuit court may summarily deny the motion. *Bentley*, 201 Wis. 2d at 309-10 (citing *Nelson*, 54 Wis. 2d at 497-98). The facts supporting the claim of ineffective assistance must be alleged in the moving papers.

The defendant cannot rely on conclusory allegations, hoping to supplement them at a hearing. *See Bentley*, 201 Wis. 2d at 313.

Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law reviewed by an appellate court *de novo*. *See Bentley*, 201 Wis. 2d at 310. If the motion is deficient, the circuit court's decision to deny it without a hearing, for any of the reasons listed above, is reviewed under the deferential erroneous exercise of discretion standard. *See Bentley*, 201 Wis. 2d at 310-11.

3. Romero-Georgana's allegation of postconviction counsel's ineffectiveness were conclusory and legally insufficient.

In his § 974.06 motion, Romero-Georgana simply alleged that postconviction counsel was ineffective for failing to raise the deportation issue on appeal (92:7; Pet-Ap. E-7). Romero-Georgana's factual allegations concern only the court's performance at the plea colloquy and *trial* counsel's actions in explaining the deportation consequences of the no contest plea. Romero-Georgana did not explain why it constituted deficient performance for postconviction counsel to choose the sentencing guidelines issue for appeal or how Romero-Georgana was prejudiced by postconviction counsel's choice to pursue the sentencing issue rather than the absence of a deportation warning during the plea colloquy (92:7-9).

The circuit court denied Romero-Georgana's claims of ineffective assistance of postconviction counsel without holding an evidentiary hearing because none of the factual allegations related to postconviction counsel and the relevant allegations were entirely conclusory. The court noted the absence of "specific facts that allow this Court to objectively determine if postconviction counsel was ineffective" (94:2; Pet-Ap. C-2). In the absence of specific factual allegations relating to the conduct and decision-making of postconviction counsel, and in the presence of mere conclusory allegations, the circuit court acted within its discretion in denying the § 974.06 motion without an evidentiary hearing. *See Bentley*, 201 Wis. 2d at 309-10.

The court of appeals agreed, ruling that the motion failed to include sufficient facts to allow the court to meaningfully assess his claims (Pet-Ap. D-4). The court pointed to two areas of pleading deficiency: (1) the motion "does not explain why he would have given up a favorable plea agreement and risked additional charges [had his plea been withdrawn] to take his chances at trial had he been properly advised about the possibility of deportation" (*id.*); and (2) the motion "also fails to address the strategic reason for [counsel's choice of issues]" (Pet-Ap. D-5). Because the motion allegations did not advance allegations sufficient to show, if they were proven at an evidentiary hearing, that Romero-Georgana's postconviction counsel rendered ineffective assistance in the choice of issues pursued on his initial postconviction motion, the court of appeals properly determined that his motion failed to state a claim that would entitle him to relief. An evidentiary hearing was then correctly denied. And since the motion allegations did not state a

valid claim for relief on the ground of postconviction counsel's ineffectiveness, Romero-Georgana failed to show a sufficient reason under *Escalona-Naranjo* for allowing him to pursue a § 974.06 motion challenge to his no-contest plea that he could have raised in his prior postconviction motions.

Romero-Georgana's brief in this court offers three short arguments attempting to make up for the pleading deficiencies of his motion. They fall short of the objective because the arguments have the same conclusory nature as his motion.

First, he contends that the choice to seek plea withdrawal or resentencing on his initial postconviction motion was his to make, and that his counsel's strategic decision-making should not have overcome his wishes. But in neither his brief argument – or in his motion – does he specifically allege that he communicated his wishes to his counsel, much less that she overrode his considered choice of postconviction remedy.

Second, while he concedes that the “clearly stronger” test should be applied to a claim challenging postconviction counsel's choice of issues to pursue (Romero-Georgana's Brief, at 24 n.7), he then argues that it is impossible to meaningfully determine whether one issue is clearly stronger than another when the issues result in different remedies: here, the remedy of plea withdrawal versus the remedy of resentencing. But the choice of competing issues AND different possible results is a natural part of criminal practice (e.g., the choice between entering a negotiated plea and foregoing a suppression motion or pursuing a motion and rejecting a plea offer). Romero-Georgana offers no authority for

the notion that the “clearly stronger” test should not be applied to a challenge to postconviction or appellate counsel’s choice of issues and remedies to pursue.

Third, seemingly acknowledging the inadequacy of his postconviction motion, he contends that without a *Machner* hearing, there is not enough evidence to evaluate his claim that his postconviction counsel’s performance was deficient. But a postconviction motion hearing is not a discovery mechanism for marshaling evidence. It is a proceeding at which a defendant can introduce evidence supporting factual allegations advanced in the motion. A defendant cannot rely on conclusory allegations in a motion, and then hope to supplement or refine them on the basis of testimony presented at the motion hearing. Romero-Georgana has offered no explanation why his unanswered questions about postconviction counsel’s performance and decision-making were not addressed via communication and investigation before the filing of his postconviction motion.

In the exercise of its independent *de novo* review, this court should similarly conclude that Romero-Georgana’s motion was legally insufficient and was properly denied.

CONCLUSION

For the reasons argued in this brief, the State of Wisconsin respectfully requests that this court affirm the decision of the Wisconsin Court of Appeals affirming the circuit court order denying Romero-Georgana's § 974.06 motion for postconviction relief.

Dated at Madison, Wisconsin, this 11th day of March, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,621 words.

Dated this 11th day of March, 2014.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 11th day of March, 2014.

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